Supreme Court, U.S.
FILED
FEB 11 1991
OFFICE OF THE CLERK

No. 90-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LAMPF, PLEVA, LIPKIND, PRUPIS & PETIGROW,
Petitioner,

v.

JOHN GILBERTSON, JOHN V. REITZ, and ANTHONY CATALAN, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

REPLY BRIEF FOR PETITIONER

Of Counsel:

JOHN K. BUSH
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

*THEODORE B. OLSON
JOHN H. STURC
THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

S. JOEL WILSON
R. DANIEL LINDAHL
BULLIVANT, HOUSER, BAILEY, PENDERGRASS & HOFFMAN
1400 Pacwest Center
1211 S.W. Fifth Avenue
Portland, OR 97204
(503) 228-6351

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
A. The Intentions of the Congress that Enacted § 10(b) are Directly Relevant to the Choice of a Limitations Period for Private Actions Brought Pursuant to that Section	1
B. The One-Year/Three-Year Rule is Clearly the Most Appropriate Limitations Period for § 10(b) Private Actions	5
C. There are No Suitable State or Federal Alternatives to the One-Year/Three-Year Rule	10
1. Common Law Fraud	10
2. The Interstate Land Sales Act	14
3. Section 20A of the ITSFEA	15
D. Petitioner is Entitled to the Benefits of the One-Year/Three-Year Rule in this Case	18
E. Conclusion	20

TABLE OF AUTHORITIES

Cases	Page
Aaron v. *SEC*, 446 U.S. 680 (1980)	3,9
Agency Holding Corp. v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987)	1,3-4,11-12
American Trucking Ass'ns, Inc. v. *Smith*, 110 S. Ct. 2323 (1990)	18-19
Armbrister v. *Roland Int'l Corp.*, 667 F. Supp. 802 (M.D. Fla. 1987)	11
Basic Inc. v. *Levinson*, 485 U.S. 224 (1988)	5,10-11
Bateman Eichler, Hill Richards, Inc. v. *Berner*, 472 U.S. 299 (1985)	14
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975)	4-5,8,10-11,15
Buford White Lumber Co. Profit Sharing & Sav. Plan & Trust v. *Octagon Properties, Ltd.*, 740 F. Supp. 1553 (W.D. Okl. 1989)	11
Ceres Partners v. *GEL Associates*, 918 F.2d 349 (2d Cir. 1990)	12-13,16,20
Chemetron Corp. v. *Business Funds, Inc.*, 718 F.2d 725 (5th Cir. 1983)	7
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971)	19-20
Davis v. *Birr, Wilson & Co.*, 839 F.2d 1369 (9th Cir. 1988)	11
DelCostello v. *International Bhd. of Teamsters*, 462 U.S. 151 (1983)	1,4,12,18-19
Dirks v. *SEC*, 463 U.S. 655 (1983)	17
Edward J. Maywod & Co. v. *SEC*, 591 F.2d 588 (10th Cir. 1979)	8
Erlenbaugh v. *United States*, 409 U.S. 239 (1972)	14
Ernst & Ernst v. *Hochfelder*, 425 U.S. 18 (1976)	5-8,10,14
Fort Stewart Schools v. *Federal Labor Relations Authority*, 110 S. Ct. 2043 (1990)	14

Table of Authorities Continued

	Page
Gatto v. *Meridian Medical Assocs., Inc.*, 882 F.2d 840 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1136 (1990)	19-20
Girouard v. *United States*, 328 U.S. 61 (1946)	3
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987)	18,20
Greenport Basin & Constr. Co. v. *United States*, 260 U.S. 512 (1923)	14
Herman & MacLean v. *Huddleston*, 459 U.S. 375 (1983)	10,15-16
In re Data Access Systems Sec. Litig., 843 F.2d 1537 (3d Cir.) (*en banc*), *cert. denied*, 488 U.S. 849 (1988)	16
IIT v. *Cornfeld*, 691 F.2d 909 (2d Cir. 1980)	11
Karahalios v. *National Fed'n of Fed. Employees*, 489 U.S. 527 (1989)	5
Kardon v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946)	7
Martin-Trigona v. *Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575 (7th Cir. 1989)	11
McAllister v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958)	8
Miles v. *Apex Marine Corp.*, 111 S. Ct. 317 (1990)	5
Occidental Life Ins. Co. v. *EEOC*, 432 U.S. 355 (1977)	14
Patterson v. *McLean Credit Union*, 109 S. Ct. 2363 (1989)	3
Pigott v. *Moran*, 231 Va. 76, 341 S.E.2d 179 (1986)	11
Piper v. *Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977)	8
Randall v. *Loftsgaarden*, 478 U.S. 647 (1986)	9
Roberts v. *Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979)	11

Table of Authorities Continued

	Page
Rodriguez de Quijas v. *Shearson/American Express*, 490 U.S. 656 (1989)	19
Santa Fe Indus., Inc. v. *Green*, 430 U.S. 462 (1977)	5
SEC v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963)	11,15,18
SEC v. *Sloan*, 436 U.S. 103 (1978)	14
Short v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. pending* (No. 90-526)	9,12-13,17,20
Sioux, Ltd., Sec. Litig. v. *Coopers & Lybrand*, 914 F.2d 61 (5th Cir. 1990)	11
Stovall v. *Denno*, 388 U.S. 293 (1966)	18
Touche Ross & Co. v. *Redington*, 442 U.S. 560 (1979)	5,14,18
United Parcel Serv., Inc. v. *Mitchell*, 451 U.S. 56 (1981)	4
United States v. *Chestman*, 903 F.2d 75 (2d Cir. 1990), *reh'g en banc granted*, Aug. 25, 1990	17
United States v. *Naftalin*, 441 U.S. 768 (1979)	14
Welch v. *Cadre Capital*, No. 10-7419 (2d Cir. Jan. 22, 1991)	19-20
Wilson v. *Garcia*, 471 U.S. 261 (1985)	1,11-12
Zuber v. *Allen*, 396 U.S. 168 (1969)	3

Federal Statutes and Regulations

	Page
Investment Advisers Act of 1940, § 206, 15 U.S.C. 80b-6	17
Securities Act of 1933, § 11, 15 U.S.C. § 77k	8
Securities Act of 1933, § 12, 15 U.S.C. § 77*l*	8
Securities Act of 1933, § 17(a), 15 U.S.C. § 77q	16,18
Securities Exchange Act of 1934, § 9, 15 U.S.C. § 78i	4,6-8,10,20

Table of Authorities Continued

	Page
Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b)	*passim*
Securities Exchange Act of 1934, § 14(e), 15 U.S.C. § 78n(e)	16-17
Securities Exchange Act of 1934, § 18, 15 U.S.C. § 78r	7
Securities Exchange Act of 1934, § 20A, 15 U.S.C. § 78t-1	3,15-18
Securities Exchange Act of 1934, § 29(b), 15 U.S.C. § 78cc(b)	8
15 U.S.C. § 1701, *et seq*	14
18 U.S.C. § 1961, *et seq*	1,12
42 U.S.C. § 1983	12
42 U.S.C. § 1988	12
17 C.F.R. § 240.10b-5	5,11
17 C.F.R. § 240.14e-3	17

Legislative Materials

	Page
H.R. Rep. No. 910, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 6043	16-17
78 Cong. Rec. 8198-8201 (May 7, 1934)	13
78 Cong. Rec. 8201 (May 7, 1934) (statement of Sen. Barkley)	13
78 Cong. Rec. 8201 (May 7, 1934) (statement of Sen. Austin)	6-7
Report of the Securities and Exchange Commission on Proposals for Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934 (Aug. 7, 1941)	7

State Statute

	Page
Ore. Rev. Stat. 59.115 (1979)	19

Table of Authorities Continued

	Page
Miscellaneous	
ABA, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645 (1980)	13
Bloomenthal, *Statutes of Limitations and the Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17 (Mar. 1985)	2,13
1 A. Bromberg & L. Lowenfels, *Securities Fraud & Commodities Fraud* (Supp. 1989)	6-7
L. Loss, *Fundamentals of Securities Regulation* (2d ed. 1988)	7,20

REPLY BRIEF FOR PETITIONER

Respondents' Brief contains fundamental errors in law and in logic, as well as irreconcilable internal inconsistences, that eviscerate the arguments they advance in this case.

A. The Intentions of the Congress that Enacted § 10(b) are Directly Relevant to the Choice of a Limitations Period for Private Actions Brought Pursuant to that Section.

Respondents and *amicus curiae* Securities and Exchange Commission ("Commission") misapprehend this Court's function in conducting interstitial lawmaking with respect to the contours of a federally created right. To ascertain a limitations period for a private remedy created expressly or by implication by Congress, the Court must discern, as faithfully as possible, "the balance that *Congress would have preferred* between the substantive policies underlying the federal claim and the policies of repose." *Wilson* v. *Garcia*, 471 U.S. 261, 270 (1985) (emphasis added).[1] Yet respondents and the Commission urge the Court to look everywhere but at the single most pertinent source of information regarding what Congress "would have preferred" as a limitations period for private actions under § 10(b) at the time it enacted that provision. *See, e.g.*, Br. for Resp. at 6, 31 n.37; Br. for SEC at 9 n.13.

---

[1] In *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Court described its methodology as discerning what "Congress would likely intend," *id.*, at 158-59 n.12, or what "Congress would choose to adopt," *id.*, at 161. In *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), the Court focused its attention on the "clear legislative intent" to pattern the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, on the Clayton Act as a rationale for borrowing the latter's four-year statute of limitations for RICO cases, *id.*, at 152, and rejected a Pennsylvania limitations period because it "was unlikely that Congress would have intended such a statute of limitations to apply," *id.*, at 153.

On the one hand, respondents (and the Commission) perceive congressional intent as irrelevant in determining the confines of private remedies under § 10(b). They therefore brush aside the motivation, debate, and ultimate policy judgments of the Congress whose actions created both the remedy under § 10(b) and the carefully crafted, comprehensive federal regulatory scheme of which it is an integral part. *See* Br. for Pet. at 11-15. That Congress, with the benefit of intense public comment and thorough debate, balanced the rights of victims of alleged securities fraud against the need for stability and certainty in the Nation's capital markets, and repeatedly determined that securities fraud actions under federal law should be governed by one-year/three-year limitations and repose periods.[2] Respondents argue that this compelling evidence of what Congress "would have preferred" is irrelevant and summarily reject it in a footnote. Br. for Resp. at 31 n.37.

On the other hand, respondents are captivated by evidence of legislative intent that they divine from congressional inaction, silence and omissions occurring decades after § 10(b) was enacted. Their school of statutory construction might be christened "inaction speaks louder than words." Thus, respondents argue (a) that "Congress intends *by its silence* that courts should apply state law" (Br. for Resp. at 6) (emphasis added); (b) that congressional failure to reverse judicial application of state limitations periods constitutes "ratification" of this practice (Br. for Resp. at 7, 36-37); (c) that amendments in 1979 to laws governing the sale of real estate, having nothing whatever to do with securities or § 10(b), furnish "direct evidence" that Congress is aware that a "three year period of repose is not appropriate" for § 10(b) cases (Br. for Resp. at 35); (d) that a congressional decision in 1990 *not* to include § 10(b) actions in a new federal statute of limitations constitutes evidence that Congress does not want a "uniform federal statute of limitations [for] § 10(b) claims"

---

[2] *See* Bloomenthal, *Statutes of Limitations and the Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17, 20 & nn. 30-31 (Mar. 1985).

(Br. for Resp. at 39 n.52); (e) that in 1988, when Congress enacted § 20A of the Insider Trading and Securities Fraud Enforcement Act and explicitly provided that it did *not* want the new law to affect other rights of action under the securities laws, it thereby signaled that it "wanted to give the courts the continued freedom to develop expansively such remedies" (Br. for Resp. at 37); and (f) that congressional enactment of a new statute of limitations in 1990 that does not apply to § 10(b) "demonstrates congressional intent that . . . any new uniform statute of limitations should apply prospectively." (Br. for Resp. at 45 n.60).

In short, respondents have produced a remarkable *tour de force* that turns traditional canons of statutory construction inside out. Legislative intent is irrelevant to respondents and reference to it is "inherently misguided" (Br. for Resp. at 31 n.37) when it pertains to the Congress that created the 1933 and 1934 securities acts and § 10(b), but becomes highly persuasive when Congress does nothing or considers unrelated matters decades later. Respondents ignore Congress when it does speak and pay attention when it does not.

As the Court has explained, "[l]egislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber* v. *Allen*, 396 U.S. 168, 185 (1969). Indeed, " '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law'." *Id.*, at 185-86 n.21 (quoting *Girouard* v. *United States*, 328 U.S. 61, 69 (1946)); *see, e.g.*, *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363, 2372 n.1 (1989); *Aaron* v. *SEC*, 446 U.S. 680, 693-94 n.11 (1980) (because "significant amendments to the securities laws" were "addressed principally to matters other than that at issue here, it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10(b) so clearly at odds with its plain meaning and legislative history"). In *Agency Holding Corp.*, the Court established a uniform federal limitations period for civil RICO actions despite congressional failure to set

aside the decisions of several courts applying various state limitations periods to such claims and notwithstanding congressional actions or inactions similar to those cited by respondents here. *See* 483 U.S., at 154-55.

It would indeed be anomalous to attribute to Congress an intention to apply inconsistent state limitations periods to a federal right of action "found by the courts to be implied in a general statutory scheme—especially when that general statutory scheme itself contains a federal statute of limitations for a related but separate form of relief." *DelCostello*, 462 U.S., at 159 n.12; *see also United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 68 n.4 (1981) (Stewart, J., concurring in the judgment) ("it cannot reasonably be assumed . . . that congressional silence reflects an intent to apply state statutes of limitation for an [implied] action . . . traceable to [a statutory scheme that includes an express limitations period]"). Here, as in *DelCostello*, the general statutory scheme, *i.e.*, the 1933 and 1934 Acts, and their language, structure and legislative history, leave no room for such an incongruous assumption. The Seventy-Third Congress repeatedly balanced the competing equities between private securities fraud actions under federal law and the interests of repose and repeatedly made the identical choice: a one-year/three-year limitations period.[3] *See Agency Holding Corp.*, 483 U.S., at 156.

In defining the scope of the § 10(b) implied private action, this Court has consistently remained faithful to the intent of the Seventy-Third Congress.[4] *See, e.g., Blue Chip*

[3] Respondents (Br. for Resp. at 29) and the Commission (Br. for SEC at 21) make the point that there are some distinctions in the phrasing of the various 1933 and 1934 Act one-year/three-year limitations periods. However, such differences are trivial, especially when compared with the wide disparity between the one, two, three, four, five and six year state limitations periods under respondents' suggested formula, *see infra* page 11, and any potential confusion can easily be eliminated by the Court's endorsement, as petitioner has suggested, of the specific limitations period set out by Congress for § 9 of the 1934 Act.

[4] This approach is consistent with the Court's conclusion that inferring a private right of action under federal law depends ultimately on whether "Congress intended to create a private cause of action." *Karahalios* v. *National Federation of Federal Employees*, 489 U.S. 527, 532 (1989); *see also Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979). It makes no sense to examine congressional intent to see whether such a right exists and not consult the same sources to determine the breadth and limitations of such a right.

Stamps v. *Manor Drug Stores*, 421 U.S. 723, 733-36 (1975) (examining language and structure of the 1933 and 1934 Acts to determine whether the § 10(b) remedy is limited to purchasers and sellers of securities); *see id.*, at 755-61 (Powell, J., concurring) ("emphasiz[ing] the significance of the texts of the Acts of 1933 and 1934" in discerning the intent of Congress with respect to the meaning of § 10(b)); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214 (1976) (a requirement of scienter under § 10(b) "was compelled by the language and history of § 10(b) and related sections of the [1933 and 1934] Acts"); *see also Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 473 (1977). And the Court has emphasized "Congress' intent in adopting other portions of the Securities Exchange Act when [it] endeavor[s] to discern the limits of private causes of action under Rule 10b-5." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 257 (1988) (White, J., concurring in part and dissenting in part) (citing *Ernst & Ernst*, 425 U.S., at 204-06).[5] Respondents offer no justification for departing from that practice in this case.

B. The One-Year/Three-Year Rule is Clearly the Most Appropriate Limitations Period for § 10(b) Private Actions.

Respondents and the Commission do not address the close textual, structural and purposive relationship be-

[5] The Court has been particularly careful to avoid constructions of § 10(b) that would expand the scope of its "implied cause of action beyond the bounds [Congress] delineated for comparable express causes of action." *Blue Chip Stamps*, 421 U.S., at 736; *see also Touche Ross & Co.*, 442 U.S., at 574 ("we are extremely reluctant to imply a cause of action . . . that is significantly broader than the [principal express civil] remedy"); *Miles* v. *Apex Marine Corp.*, 111 S. Ct. 317, 326 (1990) ("[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action . . . than Congress has allowed in [express actions]").

tween § 10(b) and the express rights of action created at the same time. *See* Br. for Pet. at 11-15, 32-42. Instead, they examine independently the elements of each of the express rights of action, discover, not surprisingly, that each differs in some respect from § 10(b) and leap to the *non sequitur* that the broad right created by § 10(b) must have a different limitations period than the other species of securities fraud created by the Seventy-Third Congress. But it simply transcends logic to conclude that the Seventy-Third Congress would have intended that any private remedy for the conduct it prohibited in 1933 and 1934 be subject to fifty different state limitations periods rather than the one standard it repeatedly endorsed.

For example, respondents identify "the requirement of scienter" as "the distinguishing feature of § 10(b) litigation" (Br. for Resp. at 15), and argue that it would be "draconian" to impose a one-year/three-year limitations period in light of § 10(b)'s scienter requirement, *see* Br. for Resp. at 21 n.19. However, the requirement of scienter is not unique to the § 10(b) implied right of action. A private plaintiff under § 9 of the 1934 Act, which prohibits "willful" manipulation of securities prices, must also prove scienter to prevail. *See Ernst & Ernst*, 425 U.S., at 205; *see also* Br. for SEC at 19 n.27 (§ 9 "requires proof of scienter"); 1 A. Bromberg & L. Lowenfels, *Securities Fraud & Commodities Fraud* § 2.4, at 2:207 (Supp. 1989) ("§ 9 is full of scienter"). Indeed, the Court's conclusion in *Ernst & Ernst* that the § 10(b) right of action includes a scienter requirement was predicated in substantial part upon the close substantive and historical relationship between §§ 9 and 10(b). *See* 425 U.S., at 201-05.[6]

[6] That relationship refutes the speculation of respondents and the Commission that Congress enacted the one-year/three-year limitations period because of the "comparatively light burden placed on a plaintiff in an action under many of the express provisions." Br. for SEC at 19; Br. for Resp. at 28. The only legislative history cited to support this argument is one Senator's comment that, in some private actions subject to the one-year/three-year rule, "the burden of proof is shifted around on the question of knowledge or willfulness in a misrepresentation." 78 Cong. Rec. 8201 (May 7, 1934) (statement of Sen. Austin). However that statement was a reference to § 18 of the 1934 Act, 15 U.S.C. § 78r, which permits a defendant to avoid liability by proving good faith and lack of knowledge that a statement was false or misleading. *See Ernst & Ernst*, 425 U.S. at 211 n.31 (describing § 18 liability). It does not pertain to § 9, which imposes impediments to recovery that are at least as rigorous as § 10(b)'s. In fact, "[p]roof requirements appear much easier under 10b-5 than under [§ 9] for market manipulation." 1 A. Bromberg & L. Lowenfels, *supra*, § 2.5(4), at 44.2; *see also* Br. for Resp. at 27 n.29 ("§ 9(e) has a strict causation requirement which is difficult for plaintiffs to satisfy"); L. Loss, *Fundamentals of Securities Regulation* 920-21 (2d ed. 1988) (describing difficulties of proving a § 9 violation and concluding that § 9 is "no bargain" for plaintiffs).

Respondents (Br. for Resp. at 27) and the Commission (Br. for SEC at 19 n.27) also urge the Court to reject § 9(e)'s statute of limitations because § 9 has been a less popular vehicle for securities fraud litigation than § 10(b). But that contention proves too much, and, in fact, illustrates why the Court should adopt for § 10(b) actions the express limitations enacted by Congress rather than judicially repealing those provisions by adopting a longer limitations period for § 10(b).

In 1941, prior to the judicial recognition of an implied right of action under § 10(b), the Commission itself referred to § 9 as "the very heart of the [Exchange Act]" and, indeed, the "most important safeguard afforded [to investors] by the act." *Report of the Securities and Exchange Commission on Proposals for Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934* 50 (Aug. 7, 1941). Shortly thereafter, a private right of action was inferred from § 10(b).[7] The courts soon began to permit, and in some respects eased, recovery under § 10(b) for fraudulent and manipulative conduct expressly prohibited by § 9,[8] and incorporated § 9 by reference in § 10(b) cases involving securities not registered on a na-

[7] *See Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946).

[8] *See, e.g., Chemetron Corp.* v. *Business Funds, Inc.*, 718 F.2d 725, 729-30 (5th Cir. 1983), (holding that § 10(b) permits actions for manipulation of securities prices without proof that manipulation "affected" price as required by § 9(a)).

tional exchange.[9] The implied remedy has thus tended to eclipse the express one.

Because many of the express actions can artfully be pleaded as § 10(b) claims, adopting a limitations period for § 10(b) claims that is longer than the express limitations period prescribed by Congress for § 9 and the other express remedies would therefore nullify the explicit decisions by Congress to limit the time within which the express actions may be maintained—an outcome that the Court should surely strive to avoid.[10]

The Commission contends that application of a one-year/three-year limitations period to § 10(b) claims is inappropriate because § 10(b) has "come to embrace a diversity of claims which could not have been envisioned in 1934." Br. for SEC at 23; *see also* Br. for Resp. at 32-33. But Congress not only anticipated but intended that § 10(b) would function as a "catchall" to encompass fraudulent conduct not specifically prohibited by the express remedies of the 1933 and 1934 Acts. *See Ernst & Ernst*, 425 U.S., at 203. Moreover, even if § 10(b)'s ambit has been expanded by the courts, that does not warrant the materially greater judicial expansion that would result if § 10(b) claims

[9] *See, e.g., Edward J. Maywod & Co.* v. *SEC*, 591 F.2d 588, 595 (10th Cir. 1979). The Commission emphasizes the fact that § 9, unlike § 10(b), applies "exclusively to securities registered on a national securities exchange," Br. for SEC at 18-19, as a justification for applying the one-year/three-year period to § 9, but not to § 10(b). That is a difference but not a distinction. Congress adopted a one-year/three-year limitations period for §§ 11 and 12 of the 1933 Act, 15 U.S.C. § 77k, 77*l*, and § 29(b) of the 1934 Act, 15 U.S.C. § 78cc, none of which is limited in application to exchange-traded securities.

[10] *See Ernst & Ernst*, 425 U.S., at 210; *Blue Chip Stamps*, 421 U.S., at 735-37; *see also McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 225-26 (1958) (applying express Jones Act statute of limitations to related admiralty claims to avoid frustrating Congress' intent with respect to the Jones Act limitations period); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 45-46 (1977) (referring to "the close relationship of Rule 10b-6 with § 9" and precluding a Rule 10b-6 claim that did not seek recovery for the kind of losses contemplated by § 9).

are subjected to a longer statute of limitations than the express remedies thoughtfully crafted and carefully limited by Congress. To the contrary, the need for predictability and repose, which prompted Congress to adopt the one-year/three-year rule, is even greater in the context of a broadly worded, open-ended antifraud provision such as § 10(b).[11]

Although the various express rights of action of the 1933 and 1934 Acts target separate categories of fraudulent conduct and impose different substantive burdens depending upon the nature of the violation (*see* Br. for SEC at 17-20), the Seventy-Third Congress did not differentiate among those provisions when it adopted a uniform one-year/three-year limitations period. It made a universal judgment with respect to the appropriate period of repose and applied it across-the-board. There is *no* evidence that it would have done anything else with a private right under

[11] Although the Commission asserts that the "force" of Congress's rationale in 1934 for adopting the one-year/three-year rule "has significantly diminished" over time (Br. for SEC at 27), it offers nothing to support this assertion other than its own *ipse dixit*. *See* Br. for SEC at 23-28. This Court has in the past resisted the temptation to accord undue weight to such *ex cathedra* pronouncements by the SEC. "Since the language and legislative history of [the 1934 Act] are dispositive" in this case, the Court need not consider the "policy arguments" advanced by the Commission. *Aaron* v. *SEC*, 446 U.S., at 700 n.19; *see also Randall v. Loftsgaarden*, 478 U.S. 647, 656 (1986) (declining to consider policy arguments). Moreover, the Commission's policy arguments, even if they were otherwise sufficiently compelling to convince the Court to repeal the legislative judgments made by the Legislative Branch, do not prove the point for which they are advanced. For example, the Commission (Br. for SEC at 24-25) disagrees with the court's statement in *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990), *cert. pending* (No. 90-526), that "[p]rudent investors almost always can sniff out fraud (or enough smoke to justify litigation) within three years," arguing that "even the SEC . . . does not complete its investigations, on average, in less than 2.25 years." Br. for SEC at 24 n.37. However, the Commission's enforcement actions generally are not governed by *any* statute of limitations (Br. for SEC at 30), and unlike private litigants the Commission enjoys the luxury of conducting a full and complete investigation prior to filing suit. It is therefore meaningless to compare the Commission's average investigatory time-table to the time needed for a private plaintiff to ascertain whether a good faith basis exists for filing a § 10(b) suit.

§ 10(b), and it is against all logic that Congress would have preferred fifty different state laws to define the § 10(b) right over the limitations period it developed for the *"comparable express causes of action."*[12]

C. There are No Suitable State or Federal Alternatives to the One-Year/Three-Year Rule.

1. *Common Law Fraud*

Although respondents claim that "common law fraud is sufficiently analogous to § 10(b) for statute of limitations purposes," their own descriptions of § 10(b) do not support that claim. Respondents concede, as they must, that the "evidentiary" and "procedural" burdens under § 10(b) "were relaxed to enable a plaintiff to more easily prove securities fraud and to extend liability 'to a broader reach than the common law had previously permitted.'" Br. for Resp. at 20-21 n.19 (quoting *Basic Inc.*, 485 U.S., at 253 (White, J., concurring in part and dissenting in part)); *see, e.g., Herman & MacLean*, 459 U.S., at 388 ("[r]eference to common-law practices can be misleading" when interpreting § 10(b)); *see also* Br. for Pet. at 22. Respondents, however, want all the benefits but none of the accouterments of federal law. Indeed, if state common law fraud actions actually were "sufficiently analogous" to § 10(b) actions, there would be little reason for respondents—who also have filed state fraud claims against petitioner—to contend so strenuously in this case for a long statute of limitations for their federal claims.

Respondents also concede that, unlike the express remedies of the 1933 and 1934 Acts, "§ 10(b) arises out of a

[12] *Blue Chip Stamps*, 421 U.S., at 736 (emphasis added). The Commission and respondents argue that the Court "has shaped the private right of action under Section 10(b) with the understanding that the one-and-three year limitations periods do not apply to it." Br. for SEC at 20; Br. for Resp. at 30-31. However, the Court has "shaped" § 10(b) so as to *avoid* "nullify[ing] the effectiveness" of the one-year/three-year statutes of limitations and the express rights of action to which they apply. *Ernst & Ernst*, 459 U.S., at 210 & n.29; *see also Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 384 & n.18 (1983). The same approach in this case would require the endorsement of the one-year/three-year statute of limitations contained in § 9(e) of the 1934 Act for § 10(b) claims.

different historical context than common law fraud." Br. for Resp. at 20-21 n.19. In fact, "the doctrines of fraud and deceit . . . developed around transactions involving land and other tangible items of wealth," *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963), an historical context that is "light years away from the world of commercial transactions to which Rule 10b-5 is applicable," *Blue Chip Stamps*, 421 U.S., at 744-45; *see also Basic Inc.*, 485 U.S., at 243-44.

More importantly, selection of state fraud limitations for § 10(b) claims would still leave the courts and the parties to struggle with difficult choice of law questions and would perpetuate "the danger of forum shopping," *Agency Holding Corp.*, 483 U.S., at 154, that currently exists in almost every § 10(b) case. *See* Br. for Pet. at 19-32. Indeed, the statutes of limitations for common law fraud vary dramatically from State to State. For example, the limitations period for fraud is one year in Virginia, *see Pigott* v. *Moran*, 231 Va. 76, 341 S.E.2d 179, 181-82 (1986); two years in Oklahoma, *see Buford White Lumber Co. Profit Sharing & Sav. Plan & Trust* v. *Octagon Properties, Ltd.*, 740 F. Supp. 1553, 1567 (W.D. Okl. 1989); three years in California, *see Davis* v. *Birr, Wilson & Co.*, 839 F.2d 1369, 1369-70 (9th Cir. 1988); four years in Texas, *see Sioux, Ltd., Sec. Litig.* v. *Coopers & Lybrand*, 914 F.2d 61, 63 (5th Cir. 1990); five years in Illinois, *see Martin-Trigona* v. *Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989); and six years in New Jersey, *see Roberts* v. *Magnetic Metals Co.*, 611 F.2d 450, 453 (3d Cir. 1979). In New York, the statute of limitations is two years from discovery of the fraud or six years from the commission of the fraud, whichever is longer, *see IIT* v. *Cornfeld*, 619 F.2d 909, 928-29 (2d Cir. 1980); while in Florida, the limitations periods are four years from discovery of the fraud but no later than twelve years after the fraud was committed, *see Armbrister* v. *Roland Int'l Corp.*, 667 F. Supp. 802, 811 (M.D. Fla. 1987).

In *Wilson* v. *Garcia*, 471 U.S. 261 (1985), upon which respondents rely (Br. for Resp. at 22-24), the Court "bor-

rowed" state personal injury limitations periods for § 1983 civil rights actions. However, the Court's decision in *Wilson* was compelled by 42 U.S.C. § 1988, in which Congress expressly instructed courts engaged in interstitial lawmaking with respect to 42 U.S.C. § 1983 to resort to common law as modified by the statutes and constitution of the forum State. 471 U.S., at 268. *Wilson* was therefore a case in which a federal statute guided the Court to select a state limitations period. *See DelCostello* 462 U.S., at 159 n.13.

Wilson presents a wholly different picture than that raised by § 10(b). Unlike the inevitably interstate nature of § 10(b) litigation, the "typical § 1983 suit" "need not [contain] any nexus to interstate commerce," and such claims "most commonly involve[ ] a dispute wholly within one state." *Agency Holding Corp.*, 483 U.S., at 154; *see Ceres Partners* v. *GEL Associates*, 918 F.2d 349, 360 (2d Cir. 1990); *Short*, 908 F.2d, at 1388; Br. for Resp. at 21 n.19 ("plaintiffs are able to bring class action suits for nationwide securities fraud or maintain actions for securities bought on a national market where such actions would not be possible under traditional common law theories"). The practicalities of § 10(b) litigation, therefore, require a uniform federal rule, and preclude application of a variety of state fraud limitations periods. *Agency Holding Corp.*, 483 U.S., at 153-54.

Section 10(b) presents an even more compelling case for application of a uniform federal statute of limitations than the RICO provision involved in *Agency Holding Corp.*, which created a generic federal civil remedy for "racketeering." Much more so than RICO, the 1933 and 1934 Acts were specifically intended to provide a uniform, federal regulatory scheme for a segment of interstate commerce that is vital to the national economy and to cure the deficiencies of an ineffective, inconsistent and inhibiting system of state-by-state regulation. *See* Br. for Pet. at 11-15. Indeed, "Congress enacted a national rule against fraud because it believed that national law ought to govern multistate transactions. Returning to state law to fetch a

period of limitations is inconsistent with the spirit of this decision." *Short*, 908 F.2d, at 1388.

Respondents also contend that state fraud limitations periods are appropriate for § 10(b) cases because such limitations periods are generally subject to indefinite equitable tolling, while the one-year/three-year period imposes an unacceptable (to respondents) outside limit on when an action may be brought. *See* Br. for Resp. at 19, 31-32.[13] But that is a legislative judgment, peculiarly within the competence of Congress to make and not an appropriate inquiry for interstitial lawmaking. Congress focused considerable attention on the issue and explicitly limited the length of time to a maximum tolling of three years. ABA, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 655 (1986) ("The express limitations periods . . . all contain an absolute cut-off."); Bloomenthal, *supra* note 2, at 21 ("*all* the participants in the debate agreed that the limitation period was . . . *absolute*") (emphasis added).[14]

Respondents' invocation of the "investor-oriented, remedial purpose of the federal securities laws" (Br. for Resp. at 17) is a one-sided perspective on the balancing process and cannot overcome the clear expression of legislative intent. As this Court has often recognized, "generalized references to the 'remedial purposes' of the 1934

---

[13] Respondents' objections to the one-year/three-year rule are directed exclusively at the three-year period of repose and its restriction of the equitable tolling doctrine. Indeed, although respondents contend that the one-year/three-year period is "too short" (*see* Br. for Resp. at 17) for application to § 10(b) claims, it is "in fact *not* shorter than most state limitations periods . . . ." *Ceres Partners*, 918 F.2d, at 349 (emphasis added); *see* Br. for Pet. at 25-26.

[14] *See* Br. for Pet. at 37-42. Congress clearly contemplated that the three-year cut-off would apply to "fraud" claims, *see* 78 Cong. Rec. 8198-8201 (May 7, 1934), and, of course, was well aware that fraud could conceivably be hidden for several years, *see, e.g.*, 78 Cong. Rec. 8201 (May 7, 1934) (statement of Sen. Barkley).

Act will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably will permit'." *Touche Ross & Co.*, 442 U.S., at 578 (quoting *SEC* v. *Sloan*, 436 U.S. 103, 116 (1978)); *see also Ernst & Ernst*, 425 U.S., at 200. Respondents urge the Court to focus only on one-half of the equation, the rights of allegedly defrauded investors, but Congress deliberately balanced those interests against the interests of market stability[15] and the interests of repose and reached a legislative judgment that is exclusively the prerogative of Congress to overturn.

2. *The Interstate Land Sales Act*

Aside from the fact that it has an expansive limitations period (Br. for Resp. at 35), there is nothing to commend the 1979 amendments to the Interstate Land Sales Act ("ILSA"), 15 U.S.C. § 1701, *et seq.*, as a source for a limitations period in securities fraud cases.

Because the 1934 Act itself supplies clear guidance regarding the appropriate limitations period for § 10(b) claims, "there is no room for the argument" that other statutes should be consulted for interpretive guidance. *Greenport Basin & Construction Co.* v. *United States*, 260 U.S. 512, 516 (1923); *see also Erlenbaugh* v. *United States*, 409 U.S. 239, 244-45 (1972). Futhermore, the ILSA, which deals with fraud in connection with interstate land sales, does not "pertain to the same subject" as § 10(b), *Erlenbaugh*, 409 U.S., at 243, and therefore cannot serve as a guide to § 10(b)'s interpretation. *See Fort Stewart Schools* v. *Federal Labor Relations Authority*, 110 S. Ct. 2043, 2047 (1990).

---

[15] A principal objective of the federal securities laws was to protect and stablize the national securities markets and the national economy. *See Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 315 (1985); *United States* v. *Naftalin*, 441 U.S. 768, 775 (1979). State fraud limitations periods, of course, were not devised with these "national interests in mind." *Occidential Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 367 (1977).

Respondents cite *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S., at 386, in support of the proposition that "[c]ongressional intent embodied in a statute with similar purposes is relevant." Br. for Resp. at 34 n.40. In that case, however, the Court concluded that the Investment Advisers Act of 1940 was to be construed consistently with "other securities legislation," *id.*, at 195, including the 1933 and 1934 Acts. But that logic supports consulting the 1933 and 1934 securities acts, not a 1979 land sales statute. In fact, the Court in *Capital Gains* expressly recognized that "doctrines of fraud and deceit which developed around transactions involving *land . . . are ill-suited* to the sale of . . . securities." *Id.*, at 194 (emphasis added). Thus, *Capital Gains* supports application of the one-year/three-year rule, not the ILSA limitations period, to § 10(b) claims.

3. *Section 20A of the ITSFEA*

The Commission's contention that § 20A of the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA"), 15 U.S.C. § 78t-1, is "more analogous" to § 10(b) than any of the express rights of action governed by the one-year/three-year rule (Br. for SEC at 17) is completely without merit. It has been rejected by every court to consider it. *See* Br. for Pet. at 47-48. Even respondents concede that § 20A is not broad enough to be analogous to § 10(b) and that "Congress made it as clear as possible" that § 20A's limitations period "should not apply to § 10(b) claims beyond the scope of § 20A." Br. for Resp. at 42.

This Court has already determined that § 10(b) can and should be interpreted in conjunction with the "comparable express causes of action"[16] contained in the 1933 and 1934 Acts. They are interrelated components of a comprehensive statutory scheme designed to combat fraudulent and manipulative practices in the national securities markets. *See Herman & MacLean*, 459 U.S., at 383-86. "All aim to

---

[16] *Blue Chip Stamps*, 421 U.S. at 736.

compensate the same type of injury. All are designed to fill a void in the common law and to create remedies that would be uniform throughout our nation's commerical universe . . . ." *In re Data Access Systems Securities Litigation*, 843 F.2d 1537, 1548-49 (3d Cir.) (*en banc*), *cert. denied*, 488 U.S. 849 (1988). The Commission's policy arguments for a longer limitations period, which should, in any event, be addressed to Congress, fail to take into account the cohesive and complementary structure of the antifraud provisions of the securities laws enacted by the Seventy-Third Congress, and the unity of purpose that animates them.

As the Commission acknowledges (*see* Br. for SEC at 13-14 & n.15), § 20A was appended to this scheme 54 years later *solely* to respond to a specific, narrow category of cases arising under the securities laws—insider trading cases involving "misappropriation" of material nonpublic information. While § 20A applies only to a limited class of defendants who trade "contemporaneously" with plaintiffs in the same "class of securities" based upon material, nonpublic information,[17] § 10(b) claims "can be brought by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or deceptive device or contrivance,' " *Herman & MacLean*, 459 U.S., at 382 (emphasis in original). Section 10(b) thus embraces a broad array of fraudulent practices (Br. for SEC at 23) that have "no relationship" to insider trading. *Ceres Partners*, 918 F.2d, at 363.

Section 20A authorizes an action for conduct prohibited by § 10(b), but also for violations of other provisions of the securities laws, including § 14(e) of the 1934 Act, 15 U.S.C. § 78n(e). *See* 15 U.S.C. § 78t-1(a) (creating private action against "[a]ny person who violates any provision of this title"); H.R. Rep. No. 910, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 6043, 6045 ("insider trading" is prohibited by "Section 17(a) of

[17] 15 U.S.C. § 78t-1(a). According to the Commission, § 20A was not even intended to encompass all of the insider trading actions that can be brought under § 10(b). Br. for SEC at 26-27.

the Securities Act, Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 and Section 206 of the Investment Advisers Act"). Accordingly, § 20A does not, as the Commission contends (Br. for SEC at 13), "require the plaintiff to establish the same elements" as § 10(b).[18]

Thus, § 20A is at once narrower and broader than § 10(b). There is simply no logic to the contention that this peculiar, hybrid remedy should be an indirect vehicle for the creation of a five-year limitations period for § 10(b) actions.

The Commission's argument that adoption of a one-year/three-year limitations period would "engender confusion" by giving plaintiffs "an incentive to engage in 'artful pleading' " (Br. for SEC at 25-26) to obtain the advantages of § 20A's longer limitations period, was cogently answered by the Seventh Circuit in *Short*:

> To obtain the five-year period of § 20A, the plaintiff would have to sue under § 20A, establish trading by an insider . . . , and accept the limitations of that statute, including the restriction of damages to the defendants' profit (as opposed to the plaintiff's loss).

908 F.2d, at 1391. Moreover, there is a far greater risk that if § 10(b) claims are subject to a five-year limitations period, plaintiffs inevitably will plead alleged violations of the express remedies as § 10(b) claims in order to avoid the one-year/three-year limitations periods. *See* Br. for Pet. at 48.

The Commission's argument that the Court should rely upon Congress's "accommodation of policies" in 1988 (Br.

[18] *Compare Dirks* v. *SEC*, 463 U.S. 662 (1983) (§ 10(b) plaintiffs must demonstrate scienter and breach of a fiduciary duty to establish insider trading claim) *with United States* v. *Chestman*, 903 F.2d 75, 84-85 (2d Cir. 1990) (Mahoney, J., concurring in part and dissenting in part) (expressing the view that under SEC Rule 14e-3 scienter is not required and "there is no requirement that any fiduciary duty exist or be violated"), *reh'g en banc granted*, Aug. 25, 1990.

for SEC at 15, 23-24), rather than the accommodation of policies of the Seventy-Third Congress when it enacted § 10(b), ignores fundamental principles of statutory construction. It is the intent of the Congress that enacted the 1934 Act that properly governs the interpretation of a provision of that Act. *See Touche Ross & Co.* v. *Redington*, 442 U.S., at 574-75 n.16 ("[g]iven the fact that our task is to discern the intent of Congress when it enacted § 17(a) in 1934, we doubt the relevance of [subsequent legislation] to our inquiry"); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S., at 199-200 (determining that the "intent of Congress must be culled from the events surrounding the [Investment Advisers Act of 1940]," rather than amendments to that legislation in 1960. " '[O]pinions attributed to a Congress twenty years after the event cannot be considered evidence of the intent of the Congress of 1940.' ") (citation omitted).[19]

D. Petitioner is Entitled to the Benefits of the One-Year/Three-Year Rule in this Case.

Respondents argue that any limitations period adopted in this case "should only be applied prospectively." Br. for Resp. at 46. However, given the Court's well-settled "policy of applying the rule it announces to the parties before the Court," *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 689-90 (1987) (O'Connor, J., concurring in part and dissenting in part), the Court need not examine the issue of retroactivity in this case.[20] *See, e.g., DelCostello*, 462

[19] Despite its disclaimers regarding the interpretive value of the intent of the Seventy-Third Congress, the Commission switches direction and relies upon the legislative history of the 1934 Act and the language of the express limitations periods enacted in 1934 to support its argument that § 20A's five-year limitations period is not subject to equitable tolling. Br. for SEC at 28-29.

[20] *See Stovall* v. *Denno*, 388 U.S. 293, 301 (1966) ("Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying [petitioners] the benefit of today's decisions."); *see also American Trucking Associations, Inc.* v. *Smith*,

U.S., at 172 (applying new, shorter federal limitations period to bar the claims of respondents).

Moreover, even if a retroactivity analysis were appropriate in this case, respondents' arguments under the three-prong inquiry of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), are without merit. The threshold inquiry under *Chevron* is whether "the decision . . . establish[ed] a new principle of law . . . by overruling clear past precedent *on which litigants may have relied.*" *Id.*, at 106 (emphasis added). Generally, unless the first *Chevron* factor is satisfied, " 'there is no occasion to consider the other two'." *Welch* v. *Cadre Capital*, No. 10-7419 (2d Cir. Jan. 22, 1991), slip op., at 1441 (citation omitted).

Respondents do not and cannot claim that they detrimentally relied upon past precedent in this case. They purchased their limited partnership interests during the period October 1979 and June 1981, and allege that they did not discover their § 10(b) claims until March 1986. J.A. 40, 89, 106, 122, 146, 161, 177, 192, 208, 224, 250. Thus, respondents, by their own admission, did not delay the filing of their claims in reliance upon past precedent because the three-year period of repose had already expired when they purportedly discovered petitioner's alleged violation of § 10(b).[21] *See, e.g., Gatto* v. *Meridian Medical Associates, Inc.*, 882 F.2d 840, 843 (3d Cir. 1989) ("[b]ecause appellants did not know the significant oper-

110 S. Ct. 2323, 2345 (1990) (Scalia, J., concurring in the judgment) ("the limitation of the Case or Controversy requirement of Article III . . . surely requires retroactivity with respect to the parties immediately before the Court"); *Rodriguez de Quijas* v. *Shearson/American Express*, 490 U.S. 656, 662 (1989) ("The general rule of long standing is that the law announced in the Court's decision controls the case at bar.").

[21] Although respondents now speculate that they might have been more diligent in investigating the facts surrounding the transactions at issue had they known that their claims were subject to a three-year statute of repose (Br. for Resp. at 48 n.65), their claims under the Oregon securities laws *were* subject to a three-year repose period, *see Ore. Rev. Stat.* 59.115 (1979) (amended in 1985 to permit tolling), but respondents nonetheless delayed filing those claims until November 1986.

ative facts underlying their cause of action . . . until after the three year absolute bar period of *Data Access* had passed, they could not possibly have relied on a longer statute of limitations period"), *cert. denied*, 110 S. Ct. 1136 (1990); *see also Short*, 908 F.2d, at 1390 ("[plaintiff] cannot have relied on Illinois law because she claims to have been unaware of the basis for litigation until a short time before filing suit").[22] Consequently, respondents cannot establish the first *Chevron* criteria—detrimental reliance—and their argument against retroactive application of the one-year/three-year limitations period must fail.[23]

E. Conclusion

As a leading commentator has observed with respect to the § 10(b) implied right of action,

> with the 1933 and 1934 Acts so closely related, why not look to *their* statutes of limitations by way of analogy rather than to a variant state law? Would it not be eminently more consistent with the overall statutory scheme to look to what Congress itself did when it was thinking specifically of private actions in securities cases rather than to a grab-bag of . . . state statutes?

L. Loss, *supra* note 6, at 995 (emphasis in original). The Court should answer that question in the affirmative and select the one-year/three-year limitations period of § 9 of the 1934 Act for § 10(b) claims.

---

[22] *Cf. Welch* v. *Cadre Capital*, *supra*, slip op. at 1434-35 (declining to apply *Ceres Partners* retroactively where plaintiffs discovered claims *before* three-year period had expired, but delayed filing suit in conformance with state law).

[23] Respondents' arguments with respect to the other *Chevron* factors also are without merit. Since respondents did not rely upon the practice of applying state limitations periods, application of the one-year/three-year limitations period will not "produce substantial inequitable results," *Chevron*, 404 U.S., at 106, but rather will produce precisely the results intended by the Seventy-Third Congress by precluding litigation of securities fraud claims more than three years after the alleged violation occurred. *See Goodman*, 482 U.S., at 663-64; *Gatto*, 882 F.2d, at 844.

February 11, 1991

Respectfully submitted,

Of Counsel:

JOHN K. BUSH
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

*THEODORE B. OLSON
JOHN H. STURC
THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

S. JOEL WILSON
R. DANIEL LINDAHL
BULLIVANT, HOUSER, BAILEY,
PENDERGRASS & HOFFMAN
1400 Pacwest Center
1211 S.W. Fifth Avenue
Portland, OR 97204
(503) 228-6351

Attorneys for Petitioner

Counsel of Record